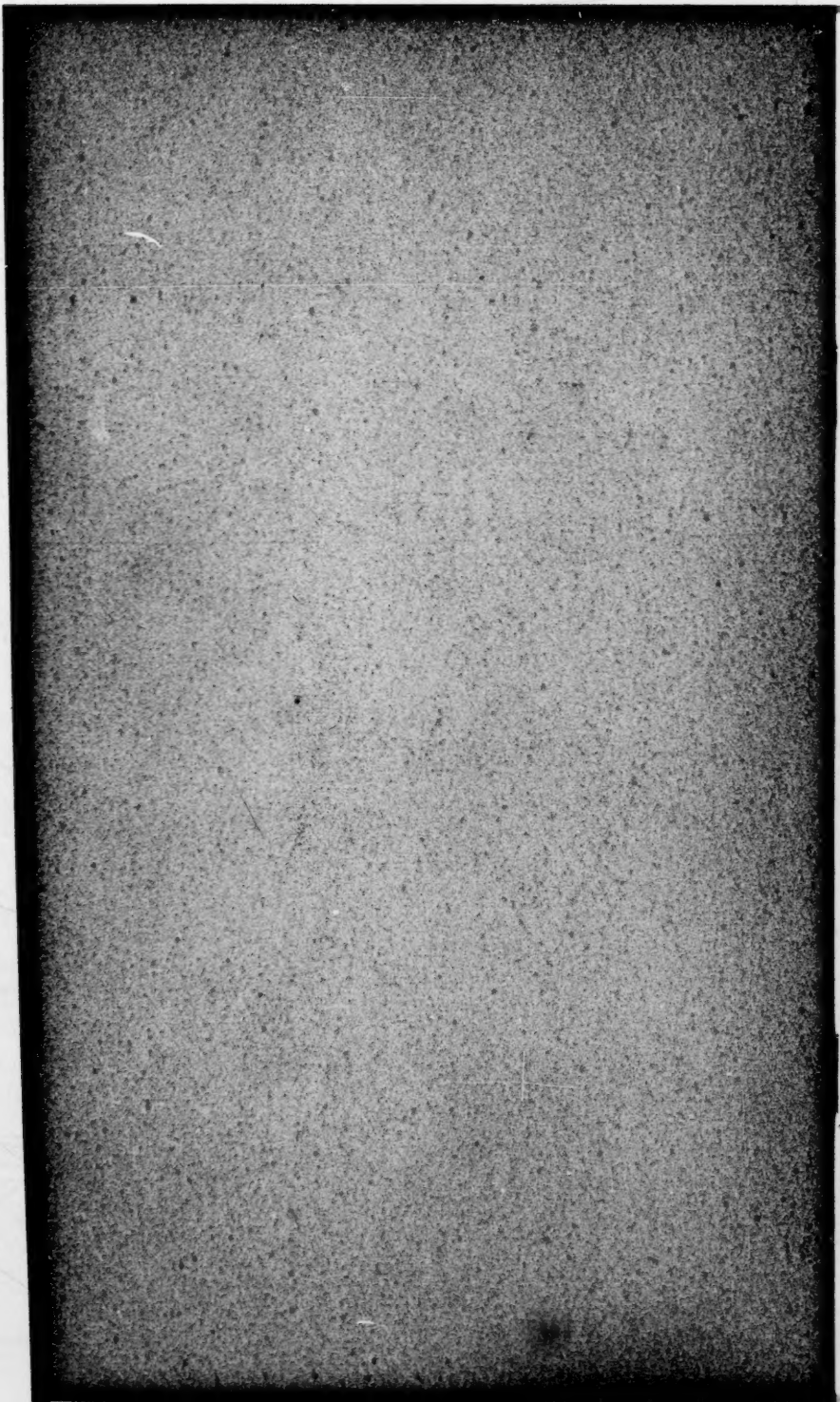


IN THE

Supreme Court of the United States

October Term, 1973

MOTION FILED

JUL 29 1974

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

against

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

against

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF NATIONAL RETAIL MERCHANTS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION OF NATIONAL RETAIL MERCHANTS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Statement

The National Retail Merchants Assocation, Inc. (hereinafter "NRMA") hereby seeks leave to file a brief as *amicus curiae*, pursuant to Rule 42 of the Rules of the

Supreme Court of the United States, in support of petitioners herein. Counsel for respondent and for both petitioners have granted written consent for the filing of this brief. However, because NRMA wished to supplement rather than duplicate any of the arguments made by either of petitioners, preparation of this brief had to await the filing of petitioners' briefs, thereby necessitating this motion.[1]

Interest of the *Amicus Curiae*

NRMA is a non-profit trade association with approximately 2,000 members operating more than 30,000 retail outlets throughout the United States. These stores range in size from small specialty shops to large full-line department stores, representing all aspects of general merchandise retailing. NRMA members employ more than two million people. Some but not most of these retail employees are represented by unions.

NRMA is in full agreement with petitioners that the unfair labor practice complaint in this case was properly dismissed by the National Labor Relations Board (hereinafter "NLRB" or "Board") because the two dissenting employees, by their bargaining demands and boycott activities, were acting in derogation of the union's statutory rights as exclusive bargaining representative. Nevertheless, NRMA is concerned lest a decision reversing the court below on this ground alone be misconstrued to suggest that retail employees not represented by a union would be free

1. Filed herewith are letters from counsel for all parties granting consent for the filing of this *amicus* brief. Since respondent has obtained an extension of time to August 13, 1974, for the filing of its brief, there can be no possible prejudice to respondent in the Court's granting the instant motion.

—while remaining on the payroll—to engage in such a flagrantly inciteful and disloyal attack upon their employer.

The court below acknowledged that the disloyal conduct of these employees could afford an independent basis for concluding that their activities were not legally protected. It also confirmed that this Court's decision in *NLRB* v. *Local Union No. 1229, IBEW* (*Jefferson Standard*), 346 U.S. 464 (1953), remained controlling on this question though the decision antedated enactment of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*). Nevertheless, the court declined to pass on the merits of the disloyalty issue, referring the matter to the Board for a determination on remand.

NRMA fully supports equal opportunity in employment, but shares the view of the court below that an allegation of job discrimination is not a license for employees to destroy the business of their employer. Indeed, it is certainly questionable whether such divisive conduct serves the interest of equal opportunity at all. In any event, it is submitted that the present availability of a broad range of legal remedies to investigate allegations of employment discrimination—and to eradicate discrimination found to exist—only reinforces the conclusion that such tactics as were employed here are not entitled to any special treatment under the Labor-Management Relations Act (hereinafter "Act"), 29 U.S.C. §150 *et seq.*

Thus, it is urged that in no event is a remand necessary in this case. On the basis of the principles which it first enunciated in *Jefferson Standard*, this Court should hold that the employees' conduct here was so injurious and dis-

loyal as to deprive them of the protection of Section 7 of the Act (29 U.S.C. §157).

In view of the foregoing, NRMA seeks leave to file the brief following hereafter.

Respectfully submitted,

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BRIEF OF NATIONAL RETAIL MERCHANTS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Interest of the *Amicus Curiae*

The interest of NRMA is set forth in its annexed motion for leave to file this *amicus* brief.

ARGUMENT

The vitriolic public attack and boycott campaign mounted by these employees against their employer, while continuing to draw full pay, constituted such flagrant disloyalty as to deprive them of the protection of Section 7 of the Act.

Writs of certiorari were granted to review a decision of the Court of Appeals for the District of Columbia Circuit (485 F.2d 917), which reversed and remanded a decision and order of the Board (192 NLRB 173), after hearing, dismissing an unfair labor practice complaint against The Emporium Capwell Co. The complaint had charged the employer with violating Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) by discharging two employees at its San Francisco department store, The Emporium, for refusing to halt a vitriolic public attack and boycott campaign conducted against their employer in their off-hours.[1]

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1. On two successive Saturdays the employees picketed in front of The Emporium, distributing a handbill which read as follows:

"BEWARE EMPORIUM SHOPPERS—
BOYCOTT IS ON! ! !

FOR YEARS AT THE EMPORIUM BLACK, BROWN, YELLOW AND RED PEOPLE, HAVE WORKED AT THE LOWEST JOBS, AT THE LOWEST LEVELS. TIME AND AGAIN WE HAVE SEEN INTELLIGENT HARD-WORKING BROTHERS AND SISTERS DENIED PROMOTIONS AND BASIC RESPECT.

THE EMPORIUM IS A 20TH CENTURY COLONIAL PLANTATION. THE BROTHERS AND SISTERS ARE BEING TREATED THE SAME WAY AS OUR BROTHERS ARE BEING TREATED IN THE SLAVE MINES OF SOUTH AFRICA.

WHENEVER THE RACIST PIG AT THE EMPORIUM INJURES OR HARMS A BLACK SISTER OR BROTH-

In dismissing the complaint, the NLRB rested on the findings and conclusions of its Trial Examiner that:

> "to extend the protection of the Act to the two employees named in the complaint would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement."

The Trial Examiner also found the "potential for injury considerable" from the dissenting employees' assault on their employer's reputation (192 NLRB at 185). But in view of his ruling based on the exclusivity doctrine, he found it unnecessary to expressly decide whether the invective and incitation to boycott amounted to such grave disloyalty as to furnish an independent legal basis for the employees' discharge.

ER, THEY INJURE AND INSULT ALL BLACK PEOPLE. THE EMPORIUM MUST PAY FOR THESE INSULTS. THEREFORE, WE ENCOURAGE ALL OF OUR PEOPLE TO TAKE THEIR MONEY OUT OF THIS RACIST STORE, UNTIL BLACK PEOPLE HAVE FULL EMPLOYMENT AND ARE PROMOTED JUSTLY THROUGHOUT THE EMPORIUM.

WE WELCOME THE SUPPORT OF OUR BROTHERS AND SISTERS FROM THE CHURCHES, UNION, SORORITIES, FRATERNITIES, SOCIAL CLUBS, AFRO-AMERICAN INSTITUTE, BLACK PANTHER PARTY, W.A.C.O. AND THE POOR PEOPLE'S INSTITUTE."

The Court of Appeals similarly side-stepped the question of disloyalty. Since the court was remanding the case for reconsideration on the exclusivity issue, it instructed the NLRB to also decide, on remand, whether the means used by these employees were so disloyal—under the test laid down by this Court in *NLRB* v. *Local Union No. 1229, IBEW* (*Jefferson Standard*), 346 U.S. 464 (1953)—as to remove them from the Act's protection. NRMA respectfully submits that—as this Court concluded in *Jefferson Standard* itself—there is no need to "remand this cause to the Board for further specificity of findings" (346 U.S. at 477); the record below amply supports the conclusion that the means chosen by these employees to register their protest were not protected.

A. The *Jefferson Standard* "Disloyalty" Test

In *Jefferson Standard*, a group of technicians employed by a television broadcasting company initiated a public campaign sharply criticizing their employer's programming and business policies as a device to exact concessions from their employer in collective bargaining. Confining the picketing to their off-hours and continuing to draw full pay, the technicians distributed thousands of handbills in front of the broadcasting company's premises charging it with a failure to provide local programming, thereby treating the city as "second class." Reasoning that there is "no more elemental cause for discharge of an employee than disloyalty to his employer", this Court sustained the ensuing discharges notwithstanding the contention that the employees were engaged in concerted activities within the scope of Section 7 of the Act. 346 U.S. at 472.

The Court pointed to several specific elements which compelled the conclusion that the actions of these employees were so disloyal as to deprive them of the protection of Section 7:

First, this was a "sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." 346 U.S. at 471.

Second, the attack was carried out while the employees remained on the payroll and were thus under a specific obligation to maintain their loyalty. As the Court observed:

> "It was a continuing attack initiated while off-duty, upon the very interests which the attackers were paid to conserve and develop. Nothing could be further from the purpose of the Act than to require an employer to finance such activities." 346 U.S. at 476.
>
> • • •
>
> "'An employee can not work and strike at the same time.... He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business.'" 346 U.S. at 476 n.12 (quoting *Hoover Co.* v. *NLRB*, 191 F.2d 380, 389 (6th Cir. 1951)).

Such an attack upon an employer by non-striking employees not only violates the employees' contractual duty to be loyal to "their common enterprise", but also has the effect of undermining "industrial plant discipline" necessary for industrial stability. 346 U.S. at 474.

Finally, while the Board had reserved the question of whether the technicians' attack upon their employer would have been protected had it been made in the context of a conventional appeal for public support in a labor dispute, this Court met that issue head-on. The Court held that:

> "Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in §7, the *means* used by the technicians in conducting the attack have deprived the attackers of the protection of that section. . . ." 346 U.S. at 477, 478 (emphasis supplied).

This Court's analysis in *Jefferson Standard* was subsequently applied by the NLRB to sustain the discharge of employees who carried out a public campaign of product disparagement while engaging in a strike. In *The Patterson-Sargent Co.*, 115 NLRB 1627 (1956), employees of a paint manufacturer had distributed handbills to customers suggesting that paint manufactured during the strike by persons other than the manufacturer's regular employees might be of inferior quality and thus might "peal, crack, blister [or] scale." 115 NLRB at 1628.

The NLRB acknowledged that the case was factually distinguishable from *Jefferson Standard* in that Patterson-Sargent's employees were out on strike at the time of the protest, and the handbills distributed to the public expressly solicited support in connection with the pending labor dispute. Nevertheless, relying on "the same broad principle" as had been established in *Jefferson Standard*, the Board ruled that "by the means employed here in the preparation and circulation of the handbills the strikers for-

feited any right they may have otherwise had to the protection of the Act." 115 NLRB at 1630.

Patterson-Sargent confirmed that employees are required to meet a certain standard of loyalty even while they are on strike and even though they disclose to the public the true purpose of their boycott campaign. Moreover, although employees may not be held to the same standard of loyalty while they are on strike as that required of them while they are working and drawing full pay, the Board found the mere disparagement of the employer's product sufficiently disloyal to justify discharge. By comparison to the protesters' actions in *Jefferson Standard* and *Patterson-Sargent,* the public attack by the employees in the instant case—while they remained on the payroll—was far more flagrant and intemperate and far more likely to cause permanent harm to the employer's reputation and business.

B. Other Unprotected Concerted Activities

Both *Jefferson Standard* and *Patterson-Sargent* involved activities characterized as "product disparagement." It is clear, however, that this is not the only form of "disloyalty" which takes concerted action outside of the Act's protection. Section 7 does not afford employees an unrestricted license to attack the character or reputation of their employer—even during the course of a labor controversy. While employers are required to tolerate a certain degree of verbal "animal exuberance" by strikers or at the collective bargaining table (*see, e.g., Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287, 293 (1941)), they may lawfully discharge employees whose

disloyalty or disrespect renders them unfit for further service.

Thus, for example, in *NLRB* v. *Blue Bell, Inc.*, 219 F.2d 796 (5th Cir. 1955), the Circuit Court sustained the discharge of an employee who published a letter incident to a union election campaign calling one of the employer's officers a "liar" and charging him with "an obvious contempt for the truth." The court reasoned that:

> "An employee, by engaging in concerted activity, does not acquire a general or unqualified right to use disrespectful epithets toward or concerning his or her employer. An employee may be lawfully discharged because of what he or she says or does in the course of a union organizing campaign if such conduct exceeds the bounds of legitimate campaign propaganda or is so disrespectful of the employer as seriously to impair the maintenance of discipline and thus render the employee unfit for further service." 219 F.2d at 798.

As noted earlier, this Court similarly recognized "the importance of enforcing industrial plant discipline and of maintaining loyalty" in upholding the discharges in *Jefferson Standard*. 346 U.S. at 474. *See also Maryland Drydock Co.* v. *NLRB*, 183 F.2d 538 (4th Cir. 1950); *NLRB* v. *Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972); *E. A. Laboratories, Inc.*, 88 NLRB 673 (1950); *Bettcher Mfg. Co.*, 76 NLRB 526 (1948).

Moreover, "disloyalty" itself is but one of a number of grounds upon which employers may discharge or discipline employees engaging in concerted activities. Thus, sit-down strikes, "quickie" strikes, slowdowns and strikes in violation of collective bargaining agreements are not pro-

tected "means" of protest though they be part and parcel of concerted action within the scope of Section 7. *See, e.g., NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 (1953); *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB* v. *Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir. 1965); *Elk Lumber Co.*, 91 NLRB 333 (1950). Similarly, trespass, destruction of property and violence may be proper cause for discharge though they occur during a labor dispute. *See, e.g., NLRB* v. *Clearfield Cheese Co.*, 213 F.2d 70 (3rd Cir. 1954); *Stewart Die Casting Corp.* v. *NLRB*, 114 F.2d 849 (7th Cir. 1940), *cert. denied*, 312 U.S. 680 (1940).

C. The Instant Case

Notwithstanding the fact that the employees' protest in the instant case related to alleged racial discrimination, the court below acknowledged that *Jefferson Standard* remained controlling on the disloyalty issue though it antedated Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*). *Cf. McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Indeed, the court expressly noted that under both the Labor Management Relations Act and Title VII "an employee may be properly discharged for engaging in disloyal conduct if that is the real cause of the discharge." 485 F.2d at 932 n.45. Of course, any discharge which was "racially motivated" or "due solely to the employer's objection against lawfully protesting his allegedly discriminatory employment practices" would be an unfair labor practice. 485 F.2d at 932 (citing *United Packinghouse Workers Union* v. *NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969) and *NLRB* v. *Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965).

Although the court below thus concluded that the applicable legal principles had not been changed by enactment of Title VII, it refused to pass on the merits of the disloyalty issue—remanding for further findings. Yet, under its own analysis, a remand for further findings was unnecessary. The Trial Examiner had made extensive findings with respect to the disloyalty issue, and the hearing record was wholly devoid of any evidence showing or tending to show that the discharge of the two employees was racially motivated or was founded upon the employer's objection to a lawful protest. To the contrary, the evidence was undisputed that the employer discharged the two employees because of their refusal to heed the employer's written warning to cease specific provocative activity. The employees had been warned that—in view of "the ample legal remedies" available to them—their actions were a "deliberate and unjustified attempt to injure your employer." 192 NLRB at 182.

Moreover, the record clearly showed that the two employees were engaged in a "premeditated" and "deliberate" public attack upon their employer's reputation and business. First by a press and radio conference, and thereafter by picketing and handbilling in front of the store, during their off-hours but while they continued on the payroll, the employees sought to "ENCOURAGE ALL OUR PEOPLE TO TAK THEIR MONEY OUT OF THIS RACIST STORE." The invective was exceedingly sharp, referring to their employer as a "RACIST PIG" and the establishment as a "20TH CENTURY COLONIAL PLANTATION," and equating the treatment of black employees at the store with that in the "SLAVE MINES OF AFRICA."

The Trial Examiner found that such a verbal assault "would have a graver potential [for injury] than an attack on the store's merchandise, and the public would be in no better position to determine the truth or falsity of the accusations." 192 NLRB at 184, 185. Noting, too, that such abusive language if addressed directly to a supervisor during working hours would most certainly have been unprotected by the Act, the Trial Examiner concluded that "the employer suffers far greater injury when such accusations and abusive terms are addressed to the general public and used as incitation to boycott." 192 NLRB at 184.

In sum, the findings below amply support the conclusion which follows inexorably from the reasoning of this Court in *Jefferson Standard* and its progeny, that the "means" used by these employees in their protest amounted to such extreme disloyalty, disrespect and disobedience as to render them unfit for further service and to deprive them of the protection of Section 7. The failure of the Board and the court below to so hold, however, leaves open the possibility that a decision by this Court sustaining the Board's dismissal of the complaint solely on the basis of the exclusivity doctrine will raise doubts as to the vitality of *Jefferson Standard*. Under these circumstances, and because the disloyalty issue is of broad and substantial public importance, it is submitted that this Court should expressly confirm that the particular means chosen by these employees to effectuate their protest were so disloyal as to deprive them of the protection of the Act.

Conclusion

For all of the foregoing reasons, as well as for those presented by petitioners, the decision of the court below should be reversed.

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